



APPENDIX

Internal Revenue Code:

SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final—

(a) *Petition for Review Not Filed On Time.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(b) *Decision Affirmed or Petition for Review Dismissed.*—

(1) *Petition for certiorari not filed on time.*—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals and no petition for certiorari has been duly filed; or

(2) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

(3) *After mandate of Supreme Court.*—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(c) *Decision Modified or Reversed.*—

(1) *Upon mandate of Supreme Court.*—If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in ac-

cordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(2) *Upon mandate of the Circuit Court of Appeals.*—If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.*—If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall

become final in the same manner as though no prior decision of the Board had been rendered.

(e) *Definitions.*—As used in this section—

(1) *Circuit Court of Appeals.*—The term “Circuit Court of Appeals” includes the United States Court of Appeals for the District of Columbia;

(2) *Mandate.*—The term “mandate”, in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(26 U. S. C., Sec. 1140.)



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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1003

WINTHROP TAYLOR,

Petitioner,

vs.

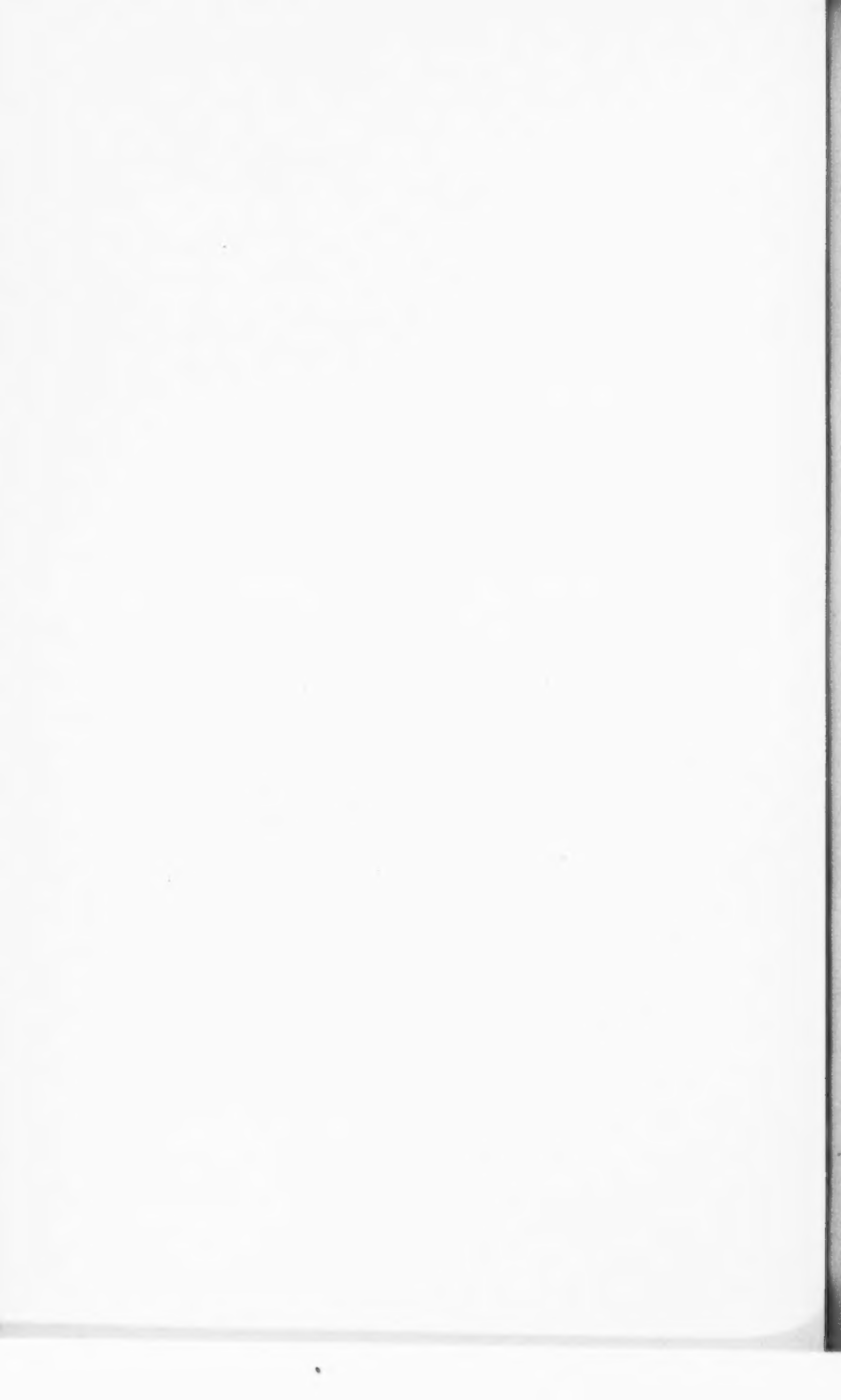
COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

WALTER R. KUHN,
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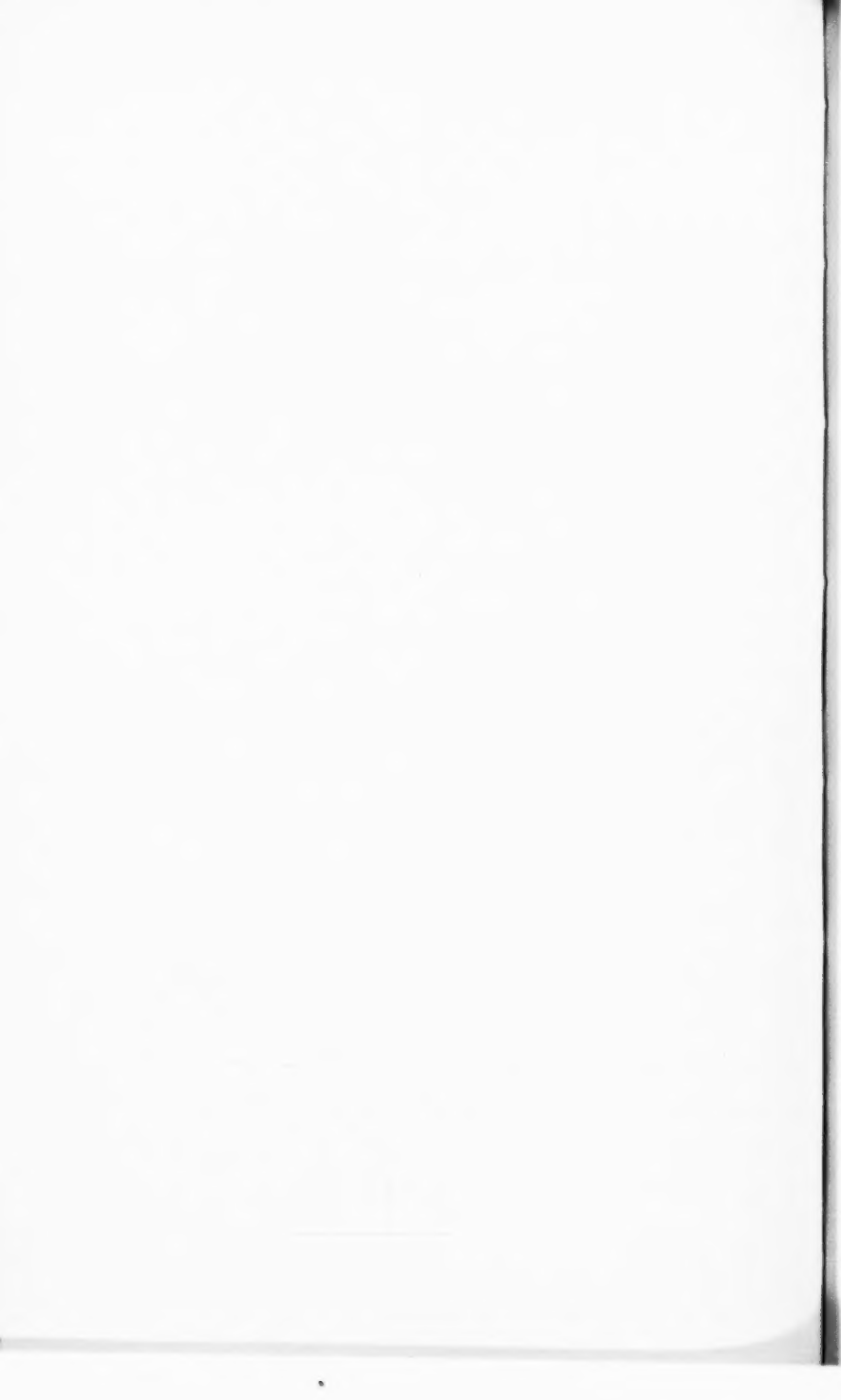


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CONCLUSION—Upon all or any of the three grounds above noted it is respectfully submitted that this Court should grant a writ of certiorari in accordance with the specifications set forth in Rule 38. The questions presented are of fundamental importance and should be clarified and decided in the interests of the true administration of tax laws and of justice	6

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REPLY BRIEF ON BEHALF OF PETITIONER

Respondent's brief in opposition to the petition for a writ of certiorari is not confined to a consideration of the grounds or reasons specified by this Court in its Rule 38 upon which an application for certiorari must be based. The brief wanders somewhat from these basic considerations and discusses aspects of factual merits which, it would seem, might better be reserved for consideration in the event of the Court granting the writ. We shall endeavor to confine this reply brief to discussion of the grounds the Court has laid down as controlling in granting certiorari.

It should be emphasized, however, that there is no material dispute of fact involved in this proceeding. The

petition sets forth in complete detail the facts with respect to the sale by the petitioner in the months of October and November, 1929 of 35,000 shares of Public Service stock, of which 23,000 had been held for more than two years and constituted capital assets, the balance of 12,000 shares having been held for less than two years; that resulting from such sales the taxpayer's entire taxable net income for the year, *agreed to by the Commissioner*, was \$538,011.74, *consisting exclusively of a capital net gain* upon which the taxpayer has fully paid (with interest) the tax of \$69,540.83; that the Circuit Court arrived at a wholly negative conclusion, treated the entire capital gain as ordinary income (of which factually there was none) *and despite the express and positive finding stated in its opinion that the taxpayer had sold in October and November, 1929 at least 19,900 shares of Public Service shares held for more than two years constituting capital assets*. From this flagrant error a deficiency judgment resulted, with interest, of over \$100,000, not a penny of which is justly due.

Such are the fundamental central facts, undisputed and indisputable and conceded by the respondent Commissioner as constituting a grossly unjust and "manifestly unconscionable" judgment. To the appeal in equity by the petitioner to the extraordinary and inherent powers of the Circuit Court for the correction of its error, the exclusive answer made by the respondent is to the effect that the Court lacked jurisdiction,—and this plea, we assume, was made by counsel "as in duty bound".

The Circuit Court "denied" the petition without opinion. Apparently such denial was based upon lack of jurisdiction since this was the plea in the respondent's answer, and also follows the interpretation of this Circuit Court in *Monjar v. Commissioner of Internal Revenue*, 140 F. 2d, 263, at 264-265, holding that where a denial, without opinion, was made by the Tax Court of a motion to reopen, it would be assumed that it was upon the ground of lack of jurisdiction.

POINT I

The Supreme Court has never passed on the question of jurisdiction.

Respondent's brief cites two decisions by this Court contending that they dispose of the question. These decisions are in *Helvering v. Northern Coal Company* (supra) and *R. Simpson & Company v. Commissioner* (supra). Neither of these cases involved an extraordinary proceeding in equity to vacate a tax judgment *concededly grossly unjust and manifestly unconscionable*. These cases involved the power of the Supreme Court to grant certiorari involving routine questions of tax law after the expiration of the thirty-day period and where under *its* rules its denial had become final. Nor did either of these cases adjudicate with respect to the inherent equity powers of the Circuit Court of Appeals to review and vacate a tax judgment *concededly grossly unjust and manifestly unconscionable* flowing from a fundamental factual error apparent upon the face of the Court's opinion, and confirmed by additional new evidence.

Under the circumstances presented the question of jurisdiction in connection with the construction of Section 1140 of the Internal Revenue Code is of real importance in the administration both of the tax law and of justice, a question which has never been decided by this Court but which should be.

POINT II

There is conflict among the Circuits.

Several of the Circuits have passed upon some aspects of this jurisdictional question. They are cited in respondent's brief. None of them involves an extraordinary pro-